

**DEPARTMENT OF STATE REVENUE  
LETTER OF FINDINGS NUMBER: 09-0561  
Use Tax  
For Tax Years 2006-08**

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**ISSUES**

**I.     Use Tax—Imposition.**

**Authority:**   IC § 6-2.5-1-1; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-4-10; IC § 6-8.1-5-1; Sales Tax Information Bulletin 21 (May 2002).

Taxpayer protests the imposition of sales and use tax on some items included as taxable in the audit.

**II.    Tax Administration—Negligence Penalty.**

**Authority:**   IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of a ten percent negligence penalty.

**STATEMENT OF FACTS**

Taxpayer is a business primarily providing services in Indiana. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not remitted the proper amount of use tax. Therefore, the Department issued proposed assessments for use tax, negligence penalties, and interest for the tax years 2006, 2007, and 2008. Taxpayer protested a portion of the assessments, including some of the use tax assessments and penalties. An administrative hearing was conducted and this Letter of Findings results. Further facts will be supplied as required.

**I.     Use Tax—Imposition.**

**DISCUSSION**

Taxpayer protests the imposition of use tax on three categories of items. The first is rental fees for tanks which hold gasses such as acetylene, nitrogen, and carbon dioxide. The second is for

gasoline Taxpayer purchased for use in its vehicles. The third is lawn maintenance fees. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The first category is gas tank rentals and the gasses contained therein. In the course of the protest process, Taxpayer provided additional documentation and analysis of how it charged its customers for gasses used in the services provided. Regarding the gasses, Taxpayer has met its burden under IC § 6-8.1-5-1(c). Regarding the tanks which Taxpayer rented for storage of the gasses, the Department refers to IC § 6-2.5-2-1, which states:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Also, Indiana imposes a complementary use tax under IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Finally, IC § 6-2.5-4-10(a) states:

A person, other than a public utility, is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person other than for subrent or sublease.

Since Taxpayer rents the tanks from the gas suppliers, Taxpayer is involved in a retail transaction as defined by IC § 6-2.5-4-10(a). Use tax is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, as provided by IC § 6-2.5-3-2(a). Therefore, Taxpayer is sustained on its protest of imposition of use tax on the gasses but denied on its protest of imposition of use tax on the tanks.

Taxpayer's second point of protest is the imposition of use tax on its purchase of gasoline for use in its trucks. Taxpayer states that it was unaware that it was not being charged sales tax on those purchases and that the mistake was on the part of the merchants. Taxpayer also states that it is sure that those merchants must have been made to pay the sales tax already and that Taxpayer should not have to pay use tax on the purchases. Taxpayer has not provided any documentation to support its belief that the merchants must have paid the sales tax on the sale of gasoline. Again, use tax is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, as provided by IC § 6-2.5-3-2(a). Since Taxpayer used or consumed the gasoline it purchased in a retail transaction, and since

there is no documentation supporting Taxpayer's belief that the merchants paid the sales tax, use tax is properly imposed on these transactions.

Taxpayer's third point of protest is the imposition of use tax on the amount it paid for lawn care services. Specifically, the lawn care service sprayed for weeds on Taxpayer's property. Taxpayer states that it is sure that the lawn care service paid sales tax at the time it purchased the chemicals which it sprayed to kill the weeds. The Department refers to IC § 6-2.5-1-1(a), which states:

Except as provided in subsection (b), "unitary transaction" includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated.

Also, the Department refers to Sales Tax Information Bulletin 21 (May 2002), which states:

A unitary transaction is the purchase of tangible personal property and services under a single agreement for which a total combined charge is calculated. A retail unitary transaction is a unitary transaction that is also a retail transaction. A retail transaction means a transaction that constitutes selling at retail. *A lawn care application is a retail transaction because the lawn care company acquires tangible personal property (chemicals) and transfers them to its customers for consideration in the ordinary course of its regularly conducted business. (Emphasis added).*

Sales Tax Information Bulletin 21 (May 2002) also states:

The purchase of chemicals by a lawn care company to be later furnished to a customer for lawn care treatment is a sale for resale and therefore exempt from the Indiana sales tax.

Therefore, the lawn care service which Taxpayer paid for was a unitary transaction, as provided by IC § 6-2.5-1-1(a). As explained by Sales Tax Information Bulletin 21 (May 2002), the lawn care company should purchase the chemicals it uses in providing its services exempt from sales tax and Taxpayer should have paid sales tax on its purchase of lawn care services. Since no sales tax was paid, use tax is properly imposed.

In conclusion, Taxpayer is sustained on its protest of the imposition of use tax on the gasses in question. Taxpayer is denied on its protest of the imposition of use tax on the rental of gas storage tanks, gasoline, and lawn care services. The Department will conduct a supplemental audit to remove the purchases of the gasses from its calculations of use tax.

### **FINDING**

Taxpayer's protest is sustained in part and denied in part.

## **II. Tax Administration—Negligence Penalty.**

### **DISCUSSION**

The Department issued proposed assessments and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty. The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to 45 IAC 15-11-2(b), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) provides in pertinent part:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, Taxpayer incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). Taxpayer has affirmatively established that its failure to pay the remaining deficiency was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c).

### **FINDING**

Taxpayer's protest is sustained.

### **CONCLUSION**

Taxpayer's protest is partially sustained on Issue I, regarding imposition of use tax on the gasses it purchased, and partially denied on Issue I, regarding the imposition of use tax on gas storage tank rentals, gasoline purchases, and lawn care service purchases. Taxpayer's protest is sustained on Issue II regarding imposition of negligence penalties.

WL/LS/DK January 8, 2010